

Case: Moran vs. Household
Interview of Stuart Shapiro, Forman & Shapiro LLP and
Michael Mitchell, Skadden Arps Slate Meagher & Flom LLP
Interviewed by: John Mark Zeberkiewicz,
Richards Layton & Finger P.A.
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1 MR. ZEBERKIEWICZ: Hi, and welcome to our discussion
2 about Household vs. Moran, a case you know something about.
3 Before we get started talking about the opinion, I want to
4 just get a little bit of background from each of you. How you
5 got involved in the case, what your practice was like at the
6 time, where you were in the state of your career. I don't know
7 if you want to—

8 MR. SHAPIRO: Sure, well, I started at Skadden in
9 September of 1970, so by 1984, I had been a partner for I
10 guess about eight years, and my practice was almost entirely
11 centered on takeover litigation. And I got involved in
12 Household because I was asked to by, I think, Joe Flom when
13 the CEO of Household, John Moran, came over and said that a
14 company he is on the board of had adopted a poison pill and
15 he'd like to challenge it. And Joe Flom asked me to handle the
16 litigation.

17 MR. MITCHELL: I joined Skadden in May of 1968 as
18 the twenty-first lawyer after five years in the U.S.

1 Attorney's Office under Bob Morgenthau. I, by 1984, had been a
2 partner for about 14 years doing mostly securities work and
3 takeover work and also some white collar. I got involved in
4 the Household matter about four or five days before the case
5 was going to be tried. I walked by a conference room, and I
6 saw Stu and Rod and about seven other people in there. So, as
7 I was wont to do, I walked in and sat and listened to them and
8 within an hour, Stu decided okay, you're part of the team, and
9 you're going to handle Alan Greenberg, put him on as a
10 witness, and you are also going to cross-examine their main
11 witness, Jay Higgins, that's your role. And that's how I got
12 involved.

13 MR. ZEBERKIEWICZ: So, your client was John Moran.
14 He had made some indications that he was interested in taking
15 over Household, but it wasn't clear, at least from the
16 opinion, that he had a very well-developed strategy to take
17 over the company. What was motivating him? What was motivating
18 the challenge of the pill- #00:02:58#

19 MR. SHAPIRO: He'd like to take over the company.

20 MR. ZEBERKIEWICZ: Was it much more - were his
21 thought process much more advanced? I mean, it seems from the
22 face of the opinion that he is - you know, he had a couple of
23 back-channel discussions. Maybe he thought the stock was
24 undervalued. You know, you got a company that has three lines

1 of business, none of which really matched up. You know, you
2 got rental cars, financial services, and groceries. And he
3 thought maybe separating them, and busting them could deliver
4 more value, ultimately. But he still - five percent, it's a
5 two-billion-dollar company- #00:03:32#

6 MR. SHAPIRO: Dyson-Kissner-Moran was a leveraged
7 buyout house, one of the earliest. And John invested in
8 companies and looked at companies, and was the CEO of DKM,
9 with the view that he might like to own them. And make a
10 profit from doing that. So, this was not an abstract exercise;
11 I don't think.

12 MR. ZEBERKIEWICZ: And that's what I wanted to get
13 is it's not an abstract exercise. Was he looking at this in
14 terms of if Household can pull this off, this might be an
15 impediment, not only in this particular case but moving
16 forward? #00:04:07#

17 MR. SHAPIRO: Well, there were two motivating
18 factors. One was Moran's; his business was LBOs, and poison
19 pills could be an impediment to that. And the other was Joe
20 Flom, who saw this creation by his friend and archrival Marty
21 Lipton and didn't want it to survive.

22 MR. ZEBERKIEWICZ: So, if you got Household in 1984,
23 thinks of itself as a potential takeover target. They hire
24 Marty Lipton of Wachtell, Goldman Sachs; they get a huge

1 presentation about the poison pill, which they ultimately
2 adopted. But at that meeting, it was an August 14 meeting,
3 they actually adopted a series of potential defensive
4 measures, including the pill, but also they had the board
5 adopt a statement to the effect that they believed the company
6 should continue as an independent company. They amended their
7 bylaws to regulate the calling of a special meeting by
8 stockholders. And they also amended their ESOP to allow the
9 individual participants, rather than the trustee, to tender
10 the shares in the underlying offer. And then, of course, they
11 adopted the pill. At that meeting, interestingly, John Moran
12 voted for all but the pill. But there is also a reference in
13 the Chancery Court opinion to a pointed discussion, I think
14 that's how the Chancery Court describes it; I imagine it was,
15 indeed, very pointed, between John Moran and Marty Lipton
16 regarding essentially whether Delaware's corporate law was
17 broad enough to capture constituencies other than just the
18 stockholders, and whether the directors had to consider
19 interests like the employees, the community, broader
20 constituency bases. I think, ultimately, the Delaware courts
21 have articulated the view that it is the stockholders to whom
22 directors owe, primarily, their duties. But I wonder if that
23 philosophical debate was at the heart of this case in any way

1 and whether that was a focus of your thinking at all?

2 #00:06:21#

3 MR. SHAPIRO: I think the short answer is no. This
4 was a crusade against the pill. You know, and frankly, driven
5 in major part by Joe Flom's desire to have the pill thrown out
6 as an improper device. You know, Marty Lipton has, over the
7 years, and well ahead of his time, been incredibly successful
8 at doing what the Federalist Society and other advocacy groups
9 have done, which is trying to sell his ideas of what the law
10 ought to be. And so, he's had articles in the *Harvard Law*
11 *Review* that were written by people who had been - some were
12 associates at his firm. He's had a lot of press stuff. He has
13 had an impact on the Delaware courts in selling his sort of
14 philosophy. And I think the notion in the early to mid-
15 eighties of multiple constituencies, each having a right to be
16 considered, is one which was adopted by some states in their
17 antitakeover laws, and one that Marty was pushing hard. But
18 our focus was to knock out the pill, and that really could
19 only be the sole focus because none of us could figure out
20 what the pill was, how it worked, how to attack it. We didn't
21 have time to consider anything else.

22 MR. ZEBERKIEWICZ: So, the key challenge, and it is
23 interesting you say that because most of the challenge was
24 based on technical validity of the pill. Primarily whether the

1 board had the ability to adopt it under the general
2 corporation law, specifically Section 157. You had a couple of
3 arguments. One, was it just a sham security? Two, 157 talks
4 about rights and options to purchase stock of "the
5 corporation." This pill was kind of a first-generation pill
6 that really had primarily the flip over as the poison, which
7 meant, essentially, once someone became an acquiring person,
8 if there was an acquisition on the back end, then the rights
9 holders would get to buy discount stock of the acquiror,
10 causing dilution on that end. And so, there was an argument
11 that this was not a right under Section 157; it was a right to
12 purchase someone else's stock. That can't be right. There was
13 also the notion that isn't this just a restriction on transfer
14 under Section 202? And one that was impermissibly adopted
15 because the stockholders did not approve it, or the parties
16 whose stock it was purporting to restrict, did not approve it.
17 That did seem to be the focus of the argument, and that's
18 where you spent most of your time. I want to just see if you
19 can kind of develop if you thought those were the strongest
20 arguments, or if you thought there was some other- #00:09:32#

21 MR. MITCHELL: That's maybe from reading the
22 opinion, but we had 10 days of trial. And the 10 days of trial
23 didn't involve those issues. The 10 days of trial listened to
24 experts testifying, the impact on the pill on the takeover

1 process. The directors testifying to their informed basis in
2 adopting the pill, to their loyalty to the company, to the
3 fact that they wouldn't abuse their power. You had something
4 like 14 or 15 very important people testifying. And so, while
5 you're right, one of the principal arguments was that the pill
6 was - essentially involved a sham security because it would
7 never become exercisable, and therefore, you know, Section 157
8 didn't authorize it. That, I don't think was enough for Joe
9 because you could always figure out a way to find another
10 statute. What Joe wanted was essentially a ruling that it was
11 a matter of business judgement that you could not adopt a pill
12 given the consequences of the pill becoming exercisable. And
13 that's what they focus of 10 or 11 days of examination and
14 cross-examination by three lawyers on our side; you, me, and
15 Rod. And Mike Schwartz, Charlie Richards, and- #00:11:03#

16 MR. SHAPIRO: George Katz.

17 MR. MITCHELL: -- George Katz on the other. I mean
18 that was what made the case so interesting, plus the
19 characters who testified. It was not some dry, you know,
20 argument. We could have moved for summary judgment if that was
21 the real issue. But that's not what was wanted here. We wanted
22 a declaration that the pill was invalid and don't start
23 putting them in all other corporations because you could then

1 amend the statutes everywhere to take care of that statutory
2 problem. #00:11:36#

3 MR. SHAPIRO: And we, I think, had a better than 50
4 percent chance of winning the case on the grounds of due care.
5 The directors had no clue what the pill did. And in the
6 depositions, we established that by simply asking them about
7 the pill. And they just had no idea. So, we could have gone in
8 and won the case, potentially, on that ground, but then they
9 would have just gone back and informed the board better and
10 adopted the pill again. So, this was not about winning this
11 case. It was about beating the pill, and so, things that were
12 short of an absolute bar on the pill really weren't viable
13 options.

14 MR. ZEBERKIEWICZ: So, it is interesting that you
15 say that because that doesn't necessarily emerge from the face
16 of the opinion. And so, I do want to develop this a little bit
17 more because in the opinion you hear, you know, there's one
18 director says this is the longest I have spent on a single
19 topic. And you know, we had a meeting two-hours long, and we
20 got all of these materials, including an article from *Fortune*
21 *Magazine* that were mailed out to us a week or two before the
22 meeting. And I imagine, though, that the pill, at the time
23 was, you know, hey look, a poison pill is a very complicated
24 instrument to begin with- #00:12:53#

1 MR. SHAPIRO: Well, it was also unique.

2 MR. ZEBERKIEWICZ: And it was very-

3 MR. SHAPIRO: So, as lawyers, when we started
4 looking at it, none of us had a clue what to make of it. So,
5 there are two things you do. You struggle to find a statutory
6 basis for why it's invalid. You examine whether or not the
7 directors were informed when they adopted it. But since - and
8 I decided this very early, that doing that really is an
9 Pyrrhic victory. So, we had to find some statutory basis,
10 something in the Delaware law that simply said this is wrong.
11 And I think we actually found something, which we haven't
12 talked about yet, which is interference with the proxy
13 suffrage. Because if you read Justice Walsh's - or Justice
14 Walsh's opinion, he, in fact, finds that the pill interferes
15 with proxy suffrage. But then concludes by saying by given -
16 you know, protecting the corporation, it's okay to take voting
17 rights away from shareholders. That seemed so inconsistent
18 with Delaware law, that I actually thought we had a shot,
19 which shows my naivete, I think, that we had a shot of the
20 Supreme Court saying you can't do that to the voting rights
21 because - but, but the other stuff, you know, whether it
22 violated 157, whether it was a sham, none of that had any sex
23 appeal. And as Mike can tell you, the sort of business and

1 social and political environment was not favorable to our
2 position.

3 MR. ZEBERKIEWICZ: And that's what I do want to get
4 into. How do you think that the political climate at the time
5 affected, if at all, the thinking at the Chancery Court and
6 Supreme Court level? #00:14:45#

7 MR. MITCHELL: Well, you know, at the time you had
8 two movements going on. You had one movement of emphasizing
9 the rights of shareholders. You had the emergence of Mike
10 Milken and a ready availability of enormous amounts of money.
11 You had people like Boone Pickens, Irwin Jacobs willing to
12 make offers for companies and then accept greenmail to be
13 taken out of their positions. You had academics like Michael
14 Jensen, at Harvard, and Mike Bradley, Easterbrook, all saying
15 that takeovers are good for the economy. But then, on the
16 other side, you had the business establishment saying wait a
17 minute. There are a lot of abuses to takeovers. You have
18 companies selling off assets when they shouldn't be. You have
19 employees losing their job because how are you going to take
20 care of the debt that was incurred in a takeover. You had the
21 greenmail situations, you had Pac-Man, which was an absurd
22 situation between Martin Marietta and Bendix. So, and you had
23 Marty Lipton on their side. And you had what Walsh very
24 cleverly called a class of fundamental structures within the

1 corporation. The rights of the shareholders to accept tender
2 offers and the rights of the directors to protect the long-
3 term interests of shareholders. Very apt statement by him.
4 Now, I think at the time of trial, we were losing that battle.
5 And it's reflected in the opinions. And this really surprised
6 me. You look at the opinions; they talk about bust-up
7 takeovers. They talk about coercive acquisition techniques.
8 They were just relishing, the judges, in this language. And
9 that surprised me. I didn't expect that that was going to
10 happen. There was no sympathy on their side or the judges'
11 side for the person who wanted to be free to make takeovers.
12 #00:17:03#

13 MR. SHAPIRO: Which maybe shouldn't be surprising in
14 retrospect. The other major political force is the unions. And
15 the unions were all against this because their people lost
16 their jobs. So, you've got the business community and the
17 labor community lobbying politicians. By the way, people who
18 make donations to politicians lobbying the politicians to
19 adopt laws and to block takeovers. And then, if you look at
20 the people who were making the takeover proposals, they were
21 not exactly the most attractive people in the world. They were
22 wild men, a lot of them, and grandiose, and talked in very
23 colorful terms and maybe lived very big, but they didn't seem
24 to be people who were terribly concerned about the people

1 whose businesses and jobs they would end up owning. So, you
2 know, in the end, I guess, Mike's been doing this longer than
3 I have, but I have been trying cases for about 48 years, and I
4 have never felt that anything but the facts mattered and how
5 they hit the decider, whether it was a jury or a judge. Who
6 was the good person? Who was the evil person? Who do I like
7 and who do I not like? And that tends to determine how cases
8 come out. And here, you had both business and labor and the
9 politicians against the position that we were taking. And you
10 have a bunch of financial manipulators, to put it nicely, who
11 can borrow a lot of money - and then borrow by selling
12 something called junk bonds, which doesn't sound very nice, to
13 take over a company, sell off its parts, and fire a lot of
14 people. Not an attractive picture.

15 MR. ZEBERKIEWICZ: Now that said, you did have one
16 advocate in your corner from the outside, which is the SEC,
17 who filed an amicus brief- #00:19:05#

18 MR. SHAPIRO: Nobody pays any attention to the SEC.

19 MR. MITCHELL: Yeah, it was poorly done on their
20 part. They went pretty far. First, they relied on, to a large
21 extent, on Ace Greenberg's testimony, who was my witness. And
22 Greenberg did not come across as a good witness before Walsh.
23 I remember Wachtell would refer to him as having a vested,
24 ideological opposition to any defensive steps taken by the

1 directors. And that's what he was. He was very skeptical about
2 directors. And the SEC placed primary reliance on him, and
3 then they said that the pill would not just deter two-tier
4 offers, but virtually any takeover. I still remember that;
5 virtually any takeover because the Supreme Court and McNeilly
6 stuck that right back down his throat - their throats when
7 they cited what Jimmy Goldsmith did with Crown Zellerbach,
8 which we can get to later on.

9 MR. ZEBERKIEWICZ: Yeah, and I did want to - that's
10 exactly where I wanted to go because in between the time of
11 the Chancery Court ruling and the Supreme Court, you do have
12 the Southern District in New York basically denying Crown
13 Zellerbach's motion to enjoin Sir James Goldsmith's proposal
14 to acquire through their pill threshold, I think he had
15 nineteen-point-nine at the time and said he was going to go
16 up. And that was relied upon by the Supreme Court as evidence
17 of I don't know how much credibility I have to give to the
18 SEC's position, or that position generally that this is going
19 to prevent all tender offers because here is one that
20 happened. #00:20:56#

21 MR. MITCHELL: Well, and also it knocked the
22 underpinnings from our argument that the rights were a sham
23 and would never be exercised. Because in Crown Zellerbach,
24 which had the exact same pill as Household, Sir James, after

1 giving 48 hours' notice to Crown Zellerbach, said I'm going to
2 buy over 20 percent, and you have until Monday at 5 o'clock.
3 And they didn't pull the pull, they went before Judge
4 Cannella, I argued against it - and I was in an anomalous
5 situation; I knew a week from now, Irv Shapiro would be
6 arguing in the Supreme Court that the pill was invalid because
7 it would prevent takeovers - and would never be exercised.
8 Well, here I'm in court saying that Sir James Goldsmith should
9 be allowed to go through the pill if that's what he wants to
10 do. And Cannella referred to it as a high-stakes game of
11 chicken. A beautiful phrase.

12 MR. SHAPIRO: He was a great judge- #00:22:03#

13 MR. MITCHELL: It's Judge, yes. I knew him from the
14 U.S. Attorney's Office. I knew he was very conservative. And
15 he was not going to give an injunction in this situation. And
16 for Sullivan and Cromwell to be as audacious as they were,
17 irreparable injury, they're going to take over the company to
18 make it acquisition proof when they had the power to prevent
19 it. He was going to buy it. So, Jimmy goes through the pill,
20 and he owns more than 20 percent of the stock. And there's
21 this wonderful quote no one had anticipated like Sir James
22 Goldsmith because what he said was when we got to 19 percent;
23 I told them I was going to explode the pill and buy more

1 shares. They didn't believe me. All along, they thought I was
2 bluffing. And that, that he was, a risk-taker, and- #00:22:58#

3 MR. SHAPIRO: If you know Jimmy Goldsmith, you would
4 not think he was bluffing. But you know, people didn't
5 anticipate - I mean he was a gambler-

6 MR. MITCHELL: Right ... Stu knew - yeah, he was -
7 his father cut him off when he was - I think the eighth grade
8 at some prep school in England. Cut him off from any money and
9 support. So, he went to the racetrack with some money, hit a
10 five-horse parlay and that then you know, secured his
11 education for the next couple years.

12 MR. SHAPIRO: He was an amazing ... yeah.

13 MR. MITCHELL: Yeah. And so, what he did hurt us, I
14 thought, more than it should have. But McNeilly just jumped on
15 it for two of our principal arguments. #00:23:43#

16 MR. SHAPIRO: But it was a self-inflicted wound. If
17 you argue that something is impossible, there are too many
18 smart people out there; they are going to find a way around
19 it. If you argue something is inequitable, in these
20 circumstances, you know you have a short. But to prove
21 impossibility is, to coin a phrase, impossible, right? And
22 that was - we were being driven by our senior partner who was
23 in this head-to-head battle with his very close friend, but
24 rival, over this device and you know, and after - frankly,

1 after the Unocal decision came down, anybody who was not
2 deeply enmeshed, but could stand back, could see that the
3 Supreme Court had said all right, we'll reserve to ourselves,
4 the courts, the ability to evaluate how directors use their
5 powers. That doesn't mean we stop them from having powers. It
6 just means that we get the chance to say whether they used
7 them appropriately or not, which is a great place for judges
8 to be in, right? It keeps them in the game. And it was a
9 predictable outcome except for that one issue, the proxy issue
10 where Justice Walsh had found that this really interfered with
11 the proxy rights, and that was a bedrock issue. You can have
12 multiple classes of directors; you can do all sorts of things
13 as long as you let shareholders vote. And this device stopped
14 shareholders from gathering together to vote. You know, you
15 couldn't put together a group of 25 percent or 20 percent, and
16 you know, there was expert testimony that was absurd from
17 Georgeson at the trial that it didn't matter how many shares
18 you owned, that didn't affect whether you could win a proxy
19 contest or not. And- #00:25:36#

20 MR. MITCHELL: And remember that chart that he
21 presented?

22 MR. SHAPIRO: Yeah. It was just absurd and Justice
23 Walsh, to his credit, did not really adopt that. I cross-
24 examined - and we had no discovery of Georgeson, for some

1 reason, I don't remember why but for some reason there had
2 been no discovery, so they came in, and they testified, and
3 they had a chart, and I had cross-examined them - not terribly
4 effectively, but the testimony seemed so absurd, and Walsh
5 didn't buy it. And he found in his opinion that this does
6 interfere with proxy rights because it's inescapable, and in
7 the Supreme Court opinion it simply-

8 MR. MITCHELL: Dismissed it.

9 MR. SHAPIRO: -- rejected his fact findings without
10 any explanation and dismissed it because if you actually dealt
11 with the issue, there was no way you could do what they wanted
12 to do, which was affirmed. But again, you had, on that panel
13 you didn't have a lot of corporate expertise - the Supreme
14 Court - and you had a huge amount of political-

15 MR. ZEBERKIEWICZ: Headwinds.

16 MR. SHAPIRO: Headwinds going on.

17 MR. ZEBERKIEWICZ: So, at that time, did you have
18 corporate clients at Skadden for whom you were acting in a
19 defensive capacity and did you-

20 MR. SHAPIRO: Oh, of course.

21 MR. ZEBERKIEWICZ: -- feel that a frontal attack of
22 the poison pill may cause some of your clients to feel
23 alienated or- #00:27:01#

1 MR. SHAPIRO: You know, Joe Flom was the silver
2 bullet. People paid - when I started at the firm, people were
3 paying \$25,000 annual retainers simply to have him available
4 in case - at any time in the future anyone attacked them. By
5 the time that practice ended, I think it was 10 times that or
6 more. That's how that firm grew because then Joe would say to
7 them, look, you've given us all this money as a retainer, you
8 really ought to be using our tax services or our EPA services
9 to - no reason to waste the money by you know. But so, people
10 weren't going to get alienated from Joe Flom because he was
11 regarded as the best protector you could have. And if he took
12 a position that you know, wasn't a Marty Lipton kind of
13 position, which was completely devoted to the defense, they
14 weren't going to walk away from Flom. I don't think that was a
15 risk really at all, but- #00:28:02#

16 MR. MITCHELL: I think there was a little bit of
17 skittishness though, Stu.

18 MR. SHAPIRO: Yeah.

19 MR. MITCHELL: But at the same time, we didn't put
20 any pills in for anybody. But not many pills were put in
21 because no one knew what was going to happen in the Supreme
22 Court. And of course, the day after the Supreme Court, Skadden
23 came out with this flip-in pill, there is no longer going to
24 be flip over that Goldsmith was able to take advantage of

1 because he delayed the merger till later on. The bad
2 consequences would take place immediately once you went over
3 nineteen-point-nine percent. I remember Peter Atkins, the
4 chair of our corporate department, had that ready to go and
5 they were traveling around the country, all the corporate
6 guys, sticking that pill in. #00:28:51#

7 MR. SHAPIRO: We represented both sides as opposed
8 to Wachtell, so we always had that issue. And occasionally,
9 like in the Datapoint case, we would actually bring in another
10 law firm to argue the case because we had already put the same
11 bylaws in at other corporations. But our clients understood
12 that if they wanted us on retainer, that was part of the
13 price. We had to be free to represent other clients. And you
14 know, there was a - we had a conflict waiver kind of provision
15 in all the retainers that dealt with those kind of things.

16 MR. ZEBERKIEWICZ: I'm going to ask you to speculate
17 a little bit because I do like the idea of Crown Zellerbach,
18 Household, kind of generation one poison pill without the flip
19 in, which did allow Sir James Goldsmith to go over and just
20 hang out for a little while and see what happens without any
21 immediate dilution to his stake. I just want to ask you to
22 speculate if Household's pill had included a flip-in
23 provision, do you think you would have had better odds, and
24 maybe even won the case? #00:29:59#

1 MR. SHAPIRO: No.

2 MR. ZEBERKIEWICZ: The same outcome?

3 MR. SHAPIRO: No. If they were willing to simply
4 ignore the proxy impact, which was the most - the strongest
5 non-statutory attack, this was - look, as a practical matter,
6 all this pill did was give the board power which they could
7 waive, which meant that their decisions were reviewable. So,
8 if it had been an atomic bomb, it wouldn't have - it didn't
9 matter what it was, it simply put them in a position where
10 they had a reviewable power. And if you go back to Schnell
11 against Chris-Craft, you know, that's a concept that at least
12 from that case, has been present in the Delaware law. You have
13 a power, but if you use it inequitably, it will be enjoined.
14 And this was just such a new and strange and puzzling device
15 that I don't think any of us - I certainly didn't - had the
16 power to sort of step back and say to Flom look, this is -
17 saying that they can't do this because it could be bad, and so
18 it ought to be forever enjoined is simply not a winning
19 argument. #00:31:12#

20 MR. MITCHELL: I agree with Stu. I mean when you go
21 to the end of Walsh's opinion, you know he talks about that
22 the plan creates the potential for the misuse of directorial
23 authority. And then he says "through its power to redeem the
24 rights before a triggering event occurs, the Household Board

1 has assumed the plenary negotiating role. It has also taken
2 upon itself the responsibility for assuring the rights are not
3 triggered in such a fashion as to inflict harm upon the
4 corporation by rendering it acquisition-proof." It cannot "be
5 assumed that the Board will act contrary to the interest of
6 the shareholders. Those events and plaintiffs' fears must
7 await another day. ... on the evidence presented, the adoption
8 of the rights plan is an appropriate exercise of managerial
9 judgment under the business judgment rule." And no matter
10 what, as Stu says, had been presented to him, he would have
11 found the same thing as he found right there. I'm not going to
12 rule ahead of time they're going to misuse their authority.
13 We'll wait and see what happens.

14 MR. ZEBERKIEWICZ: And so, that is, just setting
15 aside all the technical arguments, and you know, obviously,
16 with all the twice tested you know, first in law then in
17 equity. But setting aside technical arguments, did you think -
18 I mean, you look at Household's Board, 16 people, 9 of them, I
19 think, were outside directors. Did you think how are we going
20 to go at attacking what they did on equitable grounds if -
21 what's their interest here? #00:32:53#

22 MR. MITCHELL: That's a very good point. And the
23 problem we had was that their board was very good. You had

1 John Whitehead, you know, head of Goldman Sachs, coming up
2 through the ranks, incredible World War II record-

3 MR. SHAPIRO: Son of a linesman for the power
4 company-

5 MR. MITCHELL: Right. And later, Assistant Secretary
6 of the Treasury. You had Ray Trough, a friend of both of ours,
7 was on at least a dozen boards-

8 MR. SHAPIRO: Supreme Court law clerk.

9 MR. MITCHELL: Right. You had Ray Tower, who had
10 been on the Marathon board during the whole Mobil-Marathon
11 situation and emphasized how chaotic that situation was and
12 how you had to quickly do an asset lockup on one of their
13 biggest subsidiaries. And how instead, the pill gave you this
14 flexibility to sit back and deal with a bidder and try and
15 work out the best possible thing for shareholders. Now, maybe
16 they didn't know all the ramifications of the pill. I give you
17 that. But Lipton set it up so that they were certainly
18 informed - number one. And number two, it was very hard to
19 argue that these people were being disloyal. Even Moran
20 testified that he thought Whitehead was an honest guy.

21 #00:34:21#

22 MR. SHAPIRO: And there was no offer; there was no-

23 MR. ZEBERKIEWICZ: There was no offer, right-

24 MR. SHAPIRO: And so-

1 MR. ZEBERKIEWICZ: I think you had Murchison coming
2 in and saying, hey, we'd like to chat with you at some point—

3 MR. SHAPIRO: Yeah, but there was no - you know, if
4 there had been a live offer on the table, then the dynamic
5 would have changed. But here, this is completely abstract;
6 it's just this device shouldn't be permitted because the
7 legislature called for a vote on mergers, but it didn't call
8 for a vote on tender offers, and you know, you're effectively
9 taking away from shareholders the unilateral ability to accept
10 an offer for those shares. And so, you know, you searched for
11 statutory bases, but it's nothing very sexy about any of that.
12 If there had been an offer on the table, and of course Moran
13 was testifying that he was not going to pursue an offer, but—
14 #00:35:14#

15 MR. MITCHELL: A different situation, you're right.

16 MR. SHAPIRO: Yeah, it would have different. And
17 just as if Perelman hadn't bid 58 to top the Forstmann bid,
18 you might have had a different - you had a risk of a different
19 outcome because you don't generally get injunctions favoring
20 what might be lower bids, you know. So, in the end, the market
21 dynamics are really important to these judicial decisions.

22 MR. MITCHELL: On this very issue, when Stu and I
23 were at Penn Law School, and Leo was there, he was a little
24 bit critical about why did we bring this suit not in the

1 context of a takeover. That we should have maybe waited to the
2 takeover. I think the response is clear. You have a client
3 coming in to you and saying that this - I don't think this is
4 proper, this is right, what they are doing. And you also,
5 instead of having some 50-share stockholder, you have an
6 actual director. So, those taken together made the bringing of
7 the lawsuit at that point I think a reasonable one.
8 Notwithstanding others have criticized us for bringing it at
9 the time. And also, not bringing it in New York, where there
10 was some law at the time that might have been more helpful to
11 us. But that would not have served Joe's purpose. Joe's
12 purpose was Delaware law; it's illegal under Delaware law. I
13 don't care about New York law. #00:36:44#

14 MR. MITCHELL: Although Joe never really came up
15 with a rationale that we could sell. He had a strong
16 commitment to his belief, but-

17 MR. SHAPIRO: You have never met Joe - he was
18 brilliant, brilliant, brilliant. And also, a very good person.
19 And driven, and you would go to the end for the guy.

20 MR. ZEBERKIEWICZ: Yeah, that is great. There's one
21 thing I did want to ask about, or now as we talk about the
22 board. They did have Mr. Whitehead, who was a director at
23 Goldman. And Goldman was working, I think, with Wachtell-

24 MR. SHAPIRO: Right.

1 MR. ZEBERKIEWICZ: -- and advising the board on
2 defensive measures. And I think Mr. Whitehead was one of - you
3 know, in addition to Mr. Moran, who voted against the adoption
4 of the pill saying he didn't want - I don't think he was
5 philosophically opposed to it, but he said he didn't want the
6 company to be a guinea pig. How much fun did you have with
7 that given that his partners were evidently advising that this
8 was a structure you could use, and he was throwing up the
9 caution flag? #00:37:55#

10 MR. SHAPIRO: Well, I give you another piece of it
11 you may not know. His partner, Bob Rubin, was in Washington
12 lobbying against the pill as head of the arbitrage department
13 of Goldman Sachs. And I was down there with him. So, my father
14 actually talked to me before I cross-examined John Whitehead
15 and he said you are very - be very respectful and very polite,
16 and he's a very important fellow; the court will not like it
17 if you try to touch him up. And I don't - was it at that time
18 was John's daughter working for us? I think she was-

19 MR. MITCHELL: Anne - Anne was.

20 MR. SHAPIRO: Yeah, his daughter was also an
21 associate of Skadden. So, there were a lot of touches.
22 #00:38:43#

23 MR. MITCHELL: No, but you followed your father's
24 advice-

1 MR. SHAPIRO: Yeah-

2 MR. MITCHELL: -- rightfully so, because he was such
3 an impressive person.

4 MR. SHAPIRO: Yeah, there was nothing you could do
5 with John except you know, as he voted against it, he thought
6 you know, it was not right. He didn't want the company, which
7 was in a quiet mode, to all of a sudden become part of some
8 big brouhaha. Ray Trough, who Mike mentioned earlier, who had
9 an enormously distinguished resume - you know, partner at
10 Lazard and a Supreme Court law clerk and all sorts of stuff,
11 and on many boards, including one of our clients at the time,
12 you know, agreed that anything that interfered with the proxy
13 right would be a terrible thing. But none of that, in the end,
14 it was very clear that the political climate did not favor
15 raiders and bust-up artists, and all these terms that were
16 created either by investment bankers or the press that were
17 all negative in terms of the people making these offers.

18 #00:39:47#

19 MR. MITCHELL: Yeah, I have some bust-up artist
20 front-end loaded tender offers, bootstrap takeovers, coercive
21 acquisition techniques.

22 MR. SHAPIRO: And what's remarkable about it, if you
23 actually-

24 MR. MITCHELL: They loved-

1 MR. SHAPIRO: -- analyzed the transactions, the
2 transactions that are most coercive are the ones that actually
3 involve buying a portion of the company but not buying all of
4 it. But this pill encouraged that. You know, but--

5 MR. ZEBERKIEWICZ: As in the case of Crown
6 Zellerbach--

7 MR. SHAPIRO: Yeah. But it was just - you know, I
8 think we were naïve not to recognize that there was really no
9 constituency for these raiders being financed by junk bonds
10 who were going to sell off things and cause people to lose
11 their jobs. There just wasn't. And judges are susceptible to
12 those atmospherics. #00:40:50#

13 MR. MITCHELL: To show how political the situation
14 was, I referenced that Alan Greenberg, Ace Greenberg from Bear
15 Stearns, testified for us as an expert. And he, of course,
16 came from the trading side. He was a great, great trader, and
17 he was our Wall Street witness. Why was he our Wall Street
18 witness? Because we couldn't get anybody else to testify. I
19 was in the room once with Joe when someone whose name I will
20 not mention, and Joe was trying to get to testify - someone
21 with white hair. I hate to say that, with white hair. And he
22 said Joe; I can't do it. I promised Marty that even though I
23 am not going to testify for their side, I am not going to
24 testify for you. #00:41:30#

1 MR. SHAPIRO: But he was also a guy who only - who
2 bought or owned less than a majority or less than all of the
3 shares of most of the companies that he owned. So, if he
4 testified for the other side, he would have not been helpful
5 to them either. It was interesting. I mean the practical
6 reality of the way the markets work, and the way people own
7 companies and the abstract sort of legal arguments that were
8 being made just didn't meet at all. And you know, the
9 arguments made on the other side were equally discordant with
10 reality. They just didn't - they weren't right, and if you
11 lived in the market as many of the people we dealt with did,
12 they all - the lawyers were arguing nonsense about a lot of
13 this.

14 MR. MITCHELL: Well, yeah. Wachtell was arguing
15 well; you could always make an offer with a 95 percent
16 minimum. So, when I was cross-examining Jay Higgins from
17 Salomon Brothers, head of the M&A department, he said that's
18 ridiculous; no one ever does something like that. They said
19 you could do a consent solicitation, he said never been done
20 before, not going to happen. Two-tier offers, he admitted, as
21 long as the blended price is fair, that's fine. But he said,
22 but you can't do a two-tier offer here. And as far as bust-up
23 takeovers, I have to read this quote to you because this was
24 typified Mr. Higgins. So long as they pay a fair price, who

1 cares if the company wants to sell off assets? People buy
2 stocks to make money. I mean it. It is America. All right,
3 that was just perfect—

4 MR. ZEBERKIEWICZ: It's a great quote. #00:43:18#

5 MR. MITCHELL: Yes, it is. And then, when I finally
6 pressed them, how could you make any offer without the consent
7 of the board, he finally says, quote, The acquiror can burn up
8 the rights in a gymnasium. And then he admits that's an absurd
9 example, as most of mine are. And so, I stupidly think to
10 myself, my God, I think I have scored a point here. Maybe
11 we're going win. But who cared? It didn't matter.

12 MR. SHAPIRO: Well, but the problem we have is, and
13 I have said this to Bill Allen, and I have said it to Leo
14 Strine, have you ever sat in a board meeting and discussed you
15 know, a corporate transaction? Have you ever drafted a merger
16 agreement? Have you ever actually lived in this world that
17 you're making rulings about? I remember a client who is one of
18 the most successful investment managers in the latter part of
19 the twentieth century; he took his mutual fund complex from
20 two-million to thirty-two billion before he sold the
21 management company—

22 MR. MITCHELL: Oh, I know who you're talking about.

23 #00:44:16#

1 MR. SHAPIRO: -- and he went down and spoke in
2 Delaware to a luncheon that I think Bill Allen, when he was
3 Chancellor, had arranged, and explained to them that a ruling
4 they had made in a particular case had cost the shareholders a
5 billion dollars in market value. And they were stunned. They
6 had no idea. And you know, so we've got judges who - and in
7 Delaware, with all due respect, or maybe not so much, to the
8 Delaware Supreme Court and the Chancery Court, who look for
9 pigeonholes for legal pigeonholes to put fact patterns in. And
10 it is truly an abstract exercise and none of them, or now
11 that's not true because Andy Bouchard certainly has been
12 involved in a lot of this. But a lot of them have never
13 actually been involved in a real-life situation and understand
14 the mechanics of how things happen, the economics of them. So,
15 you know, we argue Household, and who was on the panel?

16 MR. MITCHELL: McNeilly. Moore. And I don't remember
17 the third one. #00:45:24#

18 MR. SHAPIRO: The third one was another Superior
19 Court judge.

20 MR. MITCHELL: It was another...Superior Court
21 judge, yeah.

22 MR. SHAPIRO: So, you have two judges, justices who
23 have had no corporate law experience at all. And you're trying
24 to argue something that for people who live in that world were

1 so complex they had difficulty comprehending it and figuring
2 it out. You're trying to argue to them, so they can decide
3 whether something is appropriate or not. That doesn't make any
4 sense. Right? I mean you're - to persuade people, either they
5 have to trust you-

6 MR. MITCHELL: Chief Justice Christie. #00:45:56#

7 MR. SHAPIRO: Yeah, Christie. And you don't have to
8 trust you, or they have to - you have to find some device that
9 helps them understand something that they have no
10 comprehension of going into. And that's, you know, that's the
11 problem you face as a litigator in these cases.

12 MR. MITCHELL: And the problem your father faced in
13 the Supreme Court because it was clear that McNeilly, who
14 wrote the opinion, had no clue what this case was all about.

15 MR. SHAPIRO: Yeah.

16 MR. MITCHELL: I mean, you read that opinion-

17 MR. SHAPIRO: But both of us have tried cases and
18 argued cases all over the country. You know, in Georgia and
19 California and Dakota, or whatever, and you're in front of
20 judges who you either convince that you know so much that they
21 can rely on - and that you are honest - they can rely on what
22 you're saying, or they have no clue as to what they're dealing
23 with. It's like me being a judge on a patent case, right. And
24 that's - you know, that's - and I once had a conversation

1 with, I think, Charlie Richards, and said you know, when -
2 you're retiring, why don't you go on the Chancery Court? You,
3 you know, have been in these cases for your whole career. Why
4 don't some of you guys that are experienced agree to be judges
5 for six years or something, so the court has really
6 experienced judges? And he sort of brushed me off and said
7 that's not practical or not possible. But you know, if you're
8 going to put people on these courts and they're going to deal
9 with complex and significant economic transactions, and they
10 have no background in it; that's asking an awful lot of them.

11 #00:47:29#

12 MR. MITCHELL: I hate to say I disagree with you in
13 one respect, Stu. I thought Walsh certainly had it right in
14 Revlon. Clearly, had it right in Revlon. He saw through
15 exactly what had happened.

16 MR. SHAPIRO: But that was a human situation
17 involving motivations of people as opposed to an economic
18 situation. It's the - you know, I had argument in front of the
19 Supreme Court in a case that came - it was actually Leo
20 Strine's first trial as a Vice Chancellor. And it was - the
21 other side was making an argument about a first refusal right
22 based on some definition in the definition section of the
23 contract, and that that somehow overrode the first refusal
24 right provision of the contract. And I had a three-judge

1 panel, and it split, so we ended up going en banc, and the
2 Chief Justice, Veasey, was on the en banc panel, and this
3 issue came up. And I said well, as the Chief Justice knows,
4 the definition sections of these contracts are often written
5 by a first-year associate who is using a form down the hall
6 and has nothing to do with the transaction. The substantive
7 provisions are actually negotiated. And he looked at me and
8 said Mr. Shapiro, are you testifying now? I said no, just
9 calling upon Your Honor's experience. And you know, but if he
10 hadn't been on that panel and as a corporate lawyer
11 experience, I could have been whistling in the wind. But I
12 could see, he understood that the substantive provision
13 obviously overrides some form definition. But you know, some
14 of the other justices, it wasn't so clear that they understood
15 that and because they had never negotiated a contract. And
16 that's a problem. #00:49:15#

17 MR. ZEBERKIEWICZ: So, I think what I'd like to get
18 each of you to do is to give your observations on two things.
19 Whether you think the court of the Chancery and Supreme Court
20 level got it right from a legal and policy standpoint. And you
21 can use the benefit of hindsight and what you have seen. But I
22 want to get your thoughts as to whether you think they got the
23 law wrong and the policy right or the policy wrong and the law
24 wrong or - I want you to comment on those aspects. #00:49:41#

1 MR. SHAPIRO: I think that the decision was correct
2 in terms of validating the pill as a device that they could
3 create to give themselves the power to deal with a hostile
4 takeover. I don't even pretend to be a law lawyer, so whether
5 157 or some other provision of the Delaware statute was
6 impaired or not, or invalid - or should be validated - I don't
7 know. On the proxy issue, I think they were wrong, and I think
8 the fact findings that the Vice Chancellor or Chancellor made
9 were right and that the Supreme Court didn't deal with them
10 appropriately. So, whether - and I think that the proxy - if
11 the proxy right is to be that fundamental in Delaware law,
12 then probably the pill should have been invalidated on that
13 basis, but I suspect you can design around that by simply
14 saying you can form whatever group you want to solicit
15 proxies-

16 MR. ZEBERKIEWICZ: But solely for the purpose of
17 [overlapping]-

18 MR. SHAPIRO: but solely for that purpose. So, I
19 think on a policy basis, the notion that the directors have
20 some additional power to negotiate is a perfectly sensible
21 one. And it certainly was beneficial to the bar. Made for a
22 lot more litigation. And a lot more interesting sort of
23 lawsuits and appeals. The reasoning in the opinion, I think,
24 is specious.

1 MR. ZEBERKIEWICZ: Yeah. #00:51:30#

2 MR. SHAPIRO: But I think the outcome is probably
3 correct.

4 MR. MITCHELL: I essentially agree with Stu. There
5 was no reason in the abstract to take away this power that the
6 pill gave the board to negotiate with a potential acquiror.
7 There were abuses that were going on; there were these people
8 who were taking greenmail, there were these asset sales at low
9 prices. There was this ridiculous Pac-Man situation. And by
10 saying we'll await the specific case, I think Walsh was right.
11 Because recall afterwards, that in Interco, that the pill was
12 invalidated in that situation. Or recall in Macmillan, they
13 withdrew the pill because they had to. They knew it wasn't
14 going to pass muster. So, what Walsh said, we'll stand guard,
15 we'll watch you, we'll examine your actions carefully; I think
16 that was all right. As far as the rationale goes in dismissing
17 our arguments, they were just trying to sustain Walsh in as
18 unsophisticated a way as I have ever seen. I think Moore, who
19 had just written Unocal, just didn't want to write another
20 opinion right away, and that's why he gave it to McNeilly.

21 #00:53:05#

22 MR. SHAPIRO: Well, actually McNeilly was senior to
23 him, I think.

24 MR. ZEBERKIEWICZ: I believe that's—

1 MR. SHAPIRO: Yeah, so, McNeilly may have assigned
2 it to himself.

3 MR. MITCHELL: Whatever it was, if he assigned it to
4 himself knowing how little he knew, it surprised me, but I
5 never knew McNeilly. But you know, you've read the opinion,
6 and I think you know it's wanting in material respects.

7 MR. ZEBERKIEWICZ: Well, I have greatly enjoyed this
8 discussion on Household and appreciate all your observations.

9 #00:53:36#

10 MR. SHAPIRO: I will actually leave you with
11 something that I read in one of the things, and it was a quote
12 from Collins Seitz, who had been the Chancellor in Delaware
13 and then the Chief Judge of the Third Circuit, and sort of a
14 legendary corporate law judge. And he said something like you
15 know, corporate democracy is not the same as political
16 democracy. Corporations are different entities than political
17 entities. And so, the rules have to meet the purposes of the
18 entity and the nature of the entity. And you know, we were
19 making arguments that this a violation of democracy, the
20 shareholders own the corporation, they should be - and when I
21 read that from Seitz, it sort of resonated with me that you
22 know, it was a great argument, but it really isn't, this isn't
23 an Athenian democracy where all the citizens get to vote. This
24 is a business that has a lot of purposes. And shareholders are

1 really not citizens; they are people who have invested some
2 money, and they have a different - you know, really different
3 role.

4 MR. MITCHELL: A good perspective.

5 MR. SHAPIRO: Yeah ... well, Seitz was a very
6 thoughtful guy and a very interesting guy.

7 MR. MITCHELL: Your questions were quite incisive.
8 They were helpful, and thank you for the opportunity-

9 MR. SHAPIRO: It wasn't as painful as it usually is-

10 MR. ZEBERKIEWICZ: That is great to hear-

11 MR. MITCHELL: So, it was a very good job-

12 MR. SHAPIRO: I have some others that-

13 MR. MITCHELL: A very good job.

14 MR. ZEBERKIEWICZ: That's great. I enjoyed it - I
15 enjoyed it a lot.

16 MR. SHAPIRO: It was nice meeting you.

17 MR. ZEBERKIEWICZ: Nice meeting you as well, thank
18 you very much.

19 #00:55:09#

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